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13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF OREGON**

15 **PORTLAND DIVISION**

16 WESTERN RESOURCES LEGAL
17 CENTER,
18

19 Plaintiff,

20 v.
21

22 NATIONAL OCEANIC AND
23 ATMOSPHERIC ADMINISTRATION and
24 NATIONAL MARINE FISHERIES
25 SERVICE,
26

27 Defendants.
28

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Plaintiff Western Resources Legal Center (Plaintiff), a non-profit legal education
2 organization associated with the Lewis & Clark Law School, brings this Freedom of Information
3 Act (FOIA) action against Defendants National Oceanic and Atmospheric Administration
4 (NOAA) and National Marine Fisheries Service (NMFS) (together, the Government), and alleges
5 as follows:

6 **CONTROVERSY**

7 1. This action concerns the Government's failure to timely respond to FOIA requests
8 and the Government's failure to produce public records within legally required timeframes.

9 2. The requested documents directly pertain to the public's understanding of the
10 process surrounding the Government's granting, or denial, of fee waiver requests under 15 C.F.R.
11 § 4.11.

12 3. The documents requested from the Government by Plaintiff relate to whether the
13 Government has changed its policy(ies), or created new policy(ies), regarding the granting or
14 denying of fee waiver requests under 15 C.F.R. § 4.11. Recent communications between Plaintiff
15 and the Government regarding the denial of fee waiver requests, and in fact a specific denial of a
16 fee waiver request, indicate that the Government has taken inconsistent positions regarding fee
17 waiver requests.

18 4. As a 501(c)(3) public interest educational organization with a mission to educate
19 law students and the public about natural resources law, including making records requests
20 pursuant to FOIA, Plaintiff has a strong interest in understanding the Government's policy(ies)
21 regarding fee waiver requests. Plaintiff also has an interest in understanding whether the
22 Government has changed its policy(ies) regarding the review of fee waiver requests.

23 5. In 2020, the Government denied a fee waiver request by Plaintiff, claiming that
24 Plaintiff failed to meet the criteria for a fee waiver under 15 C.F.R. § 4.11 despite having granted
25 Plaintiff's fee waiver requests in the past. Nothing about Plaintiff's status changed from the
26 granting of one fee waiver to the denial of a fee waiver. Plaintiff is understandably concerned by

this inconsistent treatment without any accompanying explanation. From all that appears, the Government has singled out Plaintiff and seeks to frustrate its access to public records.

6. Plaintiff seeks to use the requested records to raise public awareness about this controversial issue, educate law students about regulatory processes, and challenge the legality of the Government's actions in the future should Plaintiff be improperly denied a fee waiver request in the future.

7. Plaintiff asked the Government to produce all requested records *392 days ago*. Plaintiff is still waiting. Given the months-long delay, and lack of communication, upon information and belief the Government seeks to hide records from the public about its policy(ies) pertaining to the review, granting, and denial of fee waiver requests under 15 C.F.R. § 4.11.

8. Plaintiff asks that the Court issue an order directing the Government to promptly search for and produce all requested records in accordance with FOIA.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

10. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 117, because Plaintiff's principal place of business is located in Portland, Oregon.

11. Assignment to the Portland Division is proper pursuant to Local Rule 3-2(b) because “a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated” in Multnomah County.

PARTIES

12. Plaintiff is a non-profit legal education organization recognized by the Internal Revenue Service as tax exempt under 26 U.S.C. § 501(c)(3). It is associated with the Lewis & Clark Law School located in Portland, Oregon. Plaintiff's mission is to provide "law students an opportunity to develop practical legal skills and specific knowledge of natural resources and environmental laws by assisting with the legal representation of farmers, ranchers, miners, foresters, resource developers and other natural resource dependent entities." Through Plaintiff's

1 efforts, “[s]tudents gain an understanding of the litigation process and how laws impact the day to
 2 day operations of natural resource dependent businesses. Students also experience a more
 3 profound educational experience by personally observing how laws and litigation impact
 4 businesses, the economy, and local communities.”

5 13. Defendant NOAA is a federal agency within the meaning of FOIA. 5 U.S.C.
 6 § 552(f)(1). It is an executive agency within the United States Department of Commerce
 7 responsible for protecting and managing much of this country’s marine wildlife and its habitat.
 8 Plaintiff submitted the FOIA request underlying this Complaint to NMFS, a division of NOAA.
 9 NOAA is in possession and control of records that Plaintiff seeks and is, therefore, subject to FOIA
 10 pursuant to 5 U.S.C. § 552(f).

11 14. Defendant NMFS is a federal agency within the meaning of FOIA. 5 U.S.C.
 12 § 552(f)(1). NMFS is an executive agency within NOAA responsible for the stewardship of
 13 national marine resources. Plaintiff submitted the FOIA request underlying this Complaint to
 14 NMFS. NMFS is in possession and control of records that Plaintiff seeks and is, therefore, subject
 15 to FOIA pursuant to 5 U.S.C. § 552(a).

THE FREEDOM OF INFORMATION ACT

17 15. Congress enacted FOIA to protect the American people’s “right to be informed
 18 about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of*
19 the Press, 489 U.S. 749, 773 (1989) (internal quotations omitted). FOIA’s basic purpose is “to
 20 ensure an informed citizenry, vital to the functioning of a democratic society, needed to check
 21 against corruption and to hold the governors accountable to the governed.” *Nat’l Labor Relations*
22 Bd. v. Robbins Tires & Rubber Co., 437 U.S. 214, 242 (1978). To this end, FOIA allows access
 23 to government information “long shielded unnecessarily from public view” and vindicates the
 24 public’s right to “secure such information from possibly unwilling official hands.” *Env’tl. Prot.*
25 Agency v. Mink, 410 U.S. 73, 80 (1973).

26 16. FOIA imposes strict deadlines on federal agencies once they receive a request for
 27 records. Specifically, within 20 working days of receiving a FOIA request, an agency must
 28

1 determine whether to disclose responsive records and must immediately notify the requester of its
 2 determination and the reasons therefore. 5 U.S.C. § 552(a)(6)(A)(i).

3 17. Such agency determinations must indicate the scope of the documents that the
 4 agency will produce and the exemptions it will claim with respect to any withheld documents.
 5 *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 185 (D.C.
 6 Cir. 2013). An adverse determination must inform the requester of its right to appeal the agency's
 7 determination. *Id.*

8 18. An agency may extend this 20-day period only in "unusual circumstances" as
 9 defined by 5 U.S.C. § 552(a)(6)(B)(iii), and only for a maximum of 10 working days. 5 U.S.C.
 10 § 552(a)(6)(B)(i); 15 C.F.R. § 4.6(d).

11 19. Upon receipt of a request, the Government's FOIA regulations require the agency
 12 to send acknowledgment of the request to the requester. 15 C.F.R. § 4.7(a). The agency must also
 13 provide "an estimated date on which the agency will complete action on the request." 5 U.S.C.
 14 § 552(a)(7)(B)(ii).

15 20. The agency must then make the requested records "promptly" available unless it
 16 can establish that it may lawfully withhold records, or portions of records, from disclosure under
 17 narrowly defined FOIA exemptions listed in § 552(b). 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(i). In
 18 doing so, it must make reasonable efforts to search for records in a manner that is reasonably
 19 calculated to locate all records responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D); 15
 20 C.F.R. § 4.3(b). Promptly "typically would mean within days or a few weeks of a 'determination,'"
 21 not months or years." *Citizens for Responsibility and Ethics in Washington v. Federal Election
 22 Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

23 21. The United States district courts have jurisdiction "to enjoin the agency from
 24 withholding agency records and to order the production of any agency records improperly withheld
 25 from the complainant." 5 U.S.C. § 552(a)(4)(B).

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STATEMENT OF FACTS

22. On October 15, 2020, Plaintiff submitted a FOIA request to the Government, via the FOIA Online website, seeking the following four (4) categories of records related to the NOAA's review and granting of fee waivers under 15 C.F.R. § 4.11:

- The current NOAA policy(ies) regarding determination of fee waiver requests based on organization websites and whether an organization solicits donations from the public.
 - Any and all internal agency communications, memoranda, guidance documents for NOAA personnel, training guides for NOAA personnel, internal directives, and any documents pertaining to NOAA's policy(ies) regarding agency assessment of fee waiver requests and granting, or denying, of fee waiver requests.
 - Any fee waivers granted to similarly situated non-profit 501(c)(3) organizations in the past five years, including grants of fee waivers for organizations that accept donations as tax-exempt non-profit 501(c)(3) organizations.
 - Any denials in the past five years of fee waiver requests from 501(c)(3) organizations on the basis that they accept donations and, thereby, are not qualified for the waiver, or on the basis that such organizations' work is not within the public interest.

23. On October 16, 2020, having received no response (no confirmation of receipt, no tracking number, etc.) from the Government regarding the submission of the October 15, 2020 FOIA request, Plaintiff, via email, inquired with Ellen Sebastian of the NOAA FOIA office regarding apparent problems Plaintiff was experiencing when attempting to submit the FOIA request via the FOIA Online website. On October 16, 2020, Ms. Sebastian replied to Plaintiff, via email, that the Government was experiencing “technical difficulties” with the FOIA Online submission system and invited Plaintiff to submit the FOIA request via email to foia@noaa.gov.

24. On October 16, 2020, following instruction by Ms. Sebastian, Plaintiff submitted the FOIA request via email to foia@noaa.gov.

25. On October 21, 2020, having received no response from the Government regarding its FOIA request submitted on October 16, 2020, Plaintiff again emailed the Government inquiring as to the status of its FOIA request.

1 26. On October 27, 2020, Plaintiff received an email from the admin@foiaonline.gov
 2 address confirming receipt/submission of the October 16, 2020 FOIA request. This October 27,
 3 2020 email from admin@foiaonline.gov also contained a tracking number for the FOIA request.

4 27. On October 28, 2020, the Government notified Plaintiff, via email from
 5 admin@foiaonline.gov, that Plaintiff's request for a fee waiver was fully granted.

6 28. On April 22, 2021, having received no further correspondence, communication, nor
 7 document production in response to the FOIA request submitted to the Government on October 15
 8 & 16, 2020, Plaintiff sent a status inquiry email to the Government (again, copying Ms. Sebastian
 9 on the email communication). A review of the FOIA Online database indicates that the
 10 Government's own deadline for responding to the FOIA request was November 25, 2020.

11 29. On September 17, 2021, Plaintiff received an email from the NOAA FOIA Office
 12 with an attached letter acknowledging delay in fulfilling the FOIA request, but still not producing
 13 any documents, and seemingly ignoring the prior correspondence inquiring about the status of the
 14 FOIA request. The Government requested a "still interested" correspondence to be received from
 15 Plaintiff by October 18, 2021.

16 30. On September 29, 2021, Plaintiff sent a letter to the Government responding to the
 17 Government's September 17, 2021 letter, and informing the Government that Plaintiff still wants
 18 the requested records. As of November 10, 2021, Plaintiff has received no response/further
 19 communication from the Government.

20 31. Due to the continuing failure of the Government to communicate or provide
 21 requested documents, Plaintiff is concerned that the Government is ignoring its legal duty to timely
 22 respond to FOIA requests.

23 32. As of this writing, Plaintiff has yet to receive a single record nor has the
 24 Government made a timely determination within the meaning of FOIA. *Citizens for Responsibility*
 25 & Ethics in Washington v. FEC, 711 F.3d 180, 182, 186 (D.C. Cir. 2012) ("CREW").

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1
2 **FIRST CLAIM**

3 **Violation of the Freedom of Information Act**
4 **Failure to Promptly Produce Records, 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)**
5 **(Against the Government)**

6 33. Plaintiff realleges and incorporates by reference each of the allegations set forth in
7 the preceding paragraphs.

8 34. Plaintiff properly requested public records within the Government's control and the
9 Government has wrongfully withheld the requested records from Plaintiff.

10 35. After deciding to disclose responsive records in response to a FOIA request, FOIA
11 requires the Government to promptly provide responsive records, or any reasonably segregable
12 portions of responsive records, not subject to specified FOIA exemptions. In doing so, the
13 Government must make reasonable efforts to search for records in a manner that is reasonably
14 calculated to locate all records responsive to the FOIA request.

15 36. The Government violated FOIA by failing to promptly produce all public records,
16 or to disclose reasonably segregable portions of lawfully exempt records, that are responsive to
17 Plaintiff's FOIA request.

18 37. The Government also failed to comply with its own estimated date of completion
19 or complete its response to Plaintiff's FOIA request.

20 38. Plaintiff has exhausted, or is lawfully excused from exhausting, any applicable
21 administrative remedies.

22 39. Plaintiff is entitled to obtain the requested records immediately at no cost to
23 Plaintiff.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff asks that the Court enter judgment against the Government as
26 follows:

27 1. Declare the Government violated FOIA by failing to timely produce all requested
28 records;

2. Order the Government to conduct a reasonable search for all responsive records and promptly produce them and bear the costs of doing so;

3. Order the Government shall promptly produce a log of any withheld records;

4. Award Plaintiff its reasonably incurred fees and costs pursuant to
5 U.S.C. § 552(a)(4)(E) (Equal Access to Justice Act); and

5. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

DATED: November 11, 2021

WESTERN RESOURCES LEGAL CENTER

/s/ Tate Justesen
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WESTERN RESOURCES LEGAL CENTER